File: [redacted]

Date: MAR 19 1999

In re: [redacted]

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rudy Cardenas, Jr., Esquire

ON BEHALF OF SERVICE: Anthony M. Cacavio, Esquire
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(2)(A)(i), I&N Act [8 U.S.C. § 1251(a)(2)(A)(i)] -
Crime involving mural turpitude

LODGED: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)] -
Convicted of aggravated felony

APPLICATION: Asylum; withholding of deportation; waiver inadmissibility under section 212(c)

In an oral decision dated August 7, 1997, an Immigration Judge found the respondent deportable as charged, denied his request to apply for relief from deportation, and ordered him deported from the United States to China. The respondent appealed. The appeal will be sustained in part, and dismissed in part.

I. HEARING BELOW

The record reflects that the respondent, a native and citizen of China, entered the United States on May 25, 1992, as a lawful permanent resident (Exh. 4). On December 5, 1995, the respondent was convicted in the Superior Court of California, County for the offense of Los Angeles for the offense of pimping (Exh. 5). He was sentenced to serve 3 years' imprisonment. On April 19, 1996, the Immigration and Naturalization Service issued an Order to Show Cause and Notice of Hearing, and charged that the respondent was deportable pursuant section 241(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(A)(i), as an alien convicted of a crime involving moral turpitude within 5 years of entry (Exh. 1). Subsequently, the Service lodged an Additional Charge of Deportability (Form I-261), and charged that the respondent's conviction rendered him deportable pursuant to section 241(a)(2)(A)(iii) of the Act, as an alien convicted of an aggravated felony (Exh. 3).

[redacted]

In the proceedings before the Immigration Judge, the respondent contested both grounds of deportability. Although the Immigration Judge initially sustained the respondent's objection to the admission of the record of conviction, the Immigration Judge concluded that the document was admissible based upon the respondent's testimony regarding his conviction (I.J. at 4-5). Thus, based on the Service's evidence and the respondent's testimony, the Immigration Judge found the respondent deportable as charged. Finally, the Immigration Judge determined that the respondent was statutorily ineligible for relief from deportation.

II. APPELLATE ARGUMENTS

On appeal, the respondent challenges the Immigration Judge's finding that he is deportable. He further challenges the Immigration Judge's finding that he is ineligible for asylum and withholding of deportation.

In response, the Service contends that the Immigration Judge properly determined that the respondent's conviction is a crime involving moral turpitude and an aggravated felony. The Service urges the Board to adopt the Immigration Judge's decision ordering the respondent deported from the United States.

III. THE RESPONDENT'S CONVICTION

The respondent was convicted under Cal. Penal Code § 266h (1995), and was sentenced to 3 years' imprisonment. Section 266h provides, in pertinent part, as follows:

> § 266h. Pimping; punishment
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> (a) Except as provided in subdivision (b), any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person, is guilty of pimping, a felony, and shall be punished by imprisonment in the state prison for 3, 4, or 6 years.
>
> (b) If the person engaged in prostitution is a minor over the age of 16 years, the offense is punishable by imprisonment in the state prison for 3, 4, or 6 years. If the person engaged in prostitution is under 16 years of age, the offense is punishable by imprisonment in the state prison for 3, 6, or 8 years.

Cal. Penal Code § 266h (1995).

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IV. DEPORTABILITY

A. Crime Involving Moral Turpitude

Moral turpitude refers generally to conduct which is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between man and man, either one's fellow man or society in general. Matter of Franklin, 20 I&N Dec. 867 (BIA 1994); Matter of Flores, 17 I&N Dec. 225 (BIA 1980), citing Matter of McNaughton, 16 I&N Dec. 569 (BIA 1978), aff'd McNaughton v. INS, 612 F.2d 457 (9th Cir. 1980); Matter of S-, 2 I&N Dec. 353 (BIA 1945; A.G. 1945); Matter of G-, 1 I&N Dec. 73 (BIA 1941; A.G. 1941). Moral turpitude also has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude. Matter of Franklin, supra; Matter of P-, 6 I&N Dec. 795 (BIA 1955). Among the tests to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind. See Matter of Perez-Contreras, 20 I&N Dec. 615 (BIA 1992); Matter of Serna, 20 I&N Dec. 579 (BIA 1992); Matter of Short, 20 I&N Dec. 136 (BIA 1989); Matter of Danesh, 19 I&N Dec. 669 (BIA 1988); Matter of Flores, supra.

Upon examination of the statute under which the respondent was convicted, we find that the crime of pimping is a crime involving moral turpitude. In this regard, we note that in People v. Jaimez, 184 Cal.App.3d 146 (1986), the court found that pimping as defined in Cal. Penal Code § 266h was a crime involving moral turpitude. Moreover, we note that the Board has found that a conviction for offering to secure another for the purpose of prostitution is a crime involving moral turpitude. See Matter of Lambert, 11 I&N Dec. 340 (BIA 1965).

B. Aggravated felony

1. Crime of violence under 18 U.S.C. § 16

Section 101(a)(43)(F) of the Act, as it applies to the respondent, defines an "aggravated felony" as "a crime of violence (as defined in section 16 of Title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least 1 year." The term "crime of violence" is defined in 18 U.S.C. § 16 as

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In determining whether a particular offense is a "crime of violence" under this definition, we have held that either the elements of the offense must be such that physical force is an element of the crime, or that the nature of the crime -- as evidenced by the generic elements of the offense -- must be such

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that its commission ordinarily would present a risk that physical force would be used against the person or property of another, irrespective of whether the risk develops or harm actually occurs. Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994).

Upon our review, we find that Cal. Penal Code § 266h does not have as an element the "use, attempted use, or threatened use of physical force" as required under 18 U.S.C. § 16(a). Thus, if the respondent's offense is to qualify as a crime of violence it must do so under section 16(b).

In using the "generic" or "categorical" approach, we have stated:

> [t]hat is, analysis under 18 U.S.C. § 16(b) requires first that the conviction be a felony; and, if it is, that the "nature of the crime -- as elucidated by the generic elements of the offense -- is such that its commission would ordinarily present a risk that physical force would be used against the person or property of another" irrespective of whether the risk develops or harm actually occurs.

Matter of Alcantar, supra, at 812-13 (citations omitted); see United States v. Sherman, 928 F.2d 324 (9th Cir.), cert. denied, 502 U.S. 842 (1991); United States v. Jackson, 986 F.2d 312 (1993). Stated differently, "offenses within the scope of section 16(b) have as a commonly shared characteristic the potential of resulting in harm." Matter of Alcantar, supra, at 809, citing United States v. Gonzalez-Lopez, 911 F.2d 542 (11th Cir. 1990), cert. denied, 500 U.S. 933 (1991); see also Matter of Palacios, Interim Decision 3373 (BIA 1999).

This approach does not extend, however, to consideration of the underlying facts of the conviction. Matter of Alcantar, supra, at 813. Consequently, for the respondent's crime to fall within the purview of 18 U.S.C. § 16(b), it must be an offense for which the nature of the crime involves a substantial risk that physical force may be used against the person or property of another during the commission of the offense; in other words, the crime must have "the potential of resulting in harm." Id. at 809; Matter of Palacios, supra.

Here, we conclude that the respondent was not convicted of an offense that is the type that involves a substantial risk of harm to persons or property. In this regard, we note that section 266h of the Cal. Penal Code may be violated in either two basic ways: (1) by deriving support from the earnings of another's prostitution or (2) by soliciting.[1] See People v. McNulty, 202 Cal.App.3d 624, 630 (1988). As a result, it is apparent that the conduct required to violate this statute does not necessarily involve the risk that "force" will be used. Although the Service suggests that "force" may be used against a prostitute to prevent him or her from leaving or abandoning the trade or to obtain payment, this example more properly describes the crime of pandering[2] and not pimping. Moreover,

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[1] In order to violate the statute by soliciting, there must be either the receipt of compensation for soliciting for a prostitute or the solicitation of compensation for soliciting for a prostitute. See People v. McNulty, supra; People v. Smith, 44 279 P.2d 33 (Cal. 1955).

[2] Section 266i of the Cal. Penal Code provides, in relevant part, the following:

(continued...)

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we observe that the California court's have stated that section 266h was designed to discourage persons other than prostitutes from augmenting and expanding a prostitutes operation, as well as discouraging any male person from soliciting or receiving material gain from the practice of prostitution. See People v. Hashimoto, 54 Cal.App.3d 862 (1976); People v. Smith, 279 P.2d 33 (Cal. 1955).

Accordingly, we find that, upon applying the 18 U.S.C. § 16(b) test to the conduct required for a conviction under section 266h of the California Penal Code, the respondent was not convicted of a "crime of violence" within the meaning of the Act. See section 101(a)(43)(F); Matter of Alcantar, supra.

2. Sexual Abuse of a Minor

The Immigration Judge also found the respondent's conviction for pimping is an aggravated felony as defined under section 101(a)(43)(A) of the Act. Subparagraph (A) defines an "aggravated felony" as "murder, rape, or sexual abuse of a minor." Although the indictment and the respondent's testimony reveals that the respondent knew that the prostitute involved was under the age of 16 years, we do not agree with the Immigration Judge that the criminal conduct described in Cal. Penal Code § 266h by its very nature, is a form of sexual abuse of a minor.

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[2](...continued)

(a) Except as provided in subdivision (b), any person who does any of the following is guilty of pandering, a felony, and shall be punished by imprisonment in the state prison for three, four, or six years:

(1) Procures another person for the purpose of prostitution.

(2) By promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute.

(3) Procures for another person a place as an inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state.

(4) By promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate.

(5) By fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution.

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3. Prostitution Business

Section 101(a)(43)(K)(i) of the Act, as it applies to the respondent, defines an "aggravated felony" as "an offense that relates to the owning, controlling, managing, or supervising of a prostitution business." Although neither party has addressed the issue as to whether the respondent's conviction falls within the scope of section 101(a)(43)(K)(i), we find that pimping as defined under section 266h of the Cal. Penal Code does not relate to the owning, controlling, managing, or supervising a prostitution business.

C. Sufficiency of Evidence

In deportation proceedings the Service bears the burden to establish deportability by evidence which is clear, unequivocal, and convincing. See Woodby v. INS, 385 U.S. 276 (1966); 8 C.F.R. § 242.14(a) (1997). In finding that the Service had satisfied its burden of establishing deportability, the Immigration Judge considered the judgment and indictment. Both of these documents are part of the record of conviction and were properly relied upon by the Immigration Judge. Matter of Rodriguez-Cortes, 20 I&N Dec. 587 (BIA 1992); 8 C.F.R. § 3.41. Moreover, we note that the Immigration Judge also relied on the respondent's answers to the Service attorney's questioning regarding his conviction. Thus, we find no merit to the respondent's arguments on appeal that the Immigration Judge erred in admitting these documents over his objections.

V. SUMMARY

In sum, we find that the a conviction for pimping as defined under section 266h of the Cal. Penal Code is a crime involving moral turpitude. Since the respondent committed this crime within 5 years of his entry into the United States, the Immigration Judge properly found the respondent deportable pursuant to section 241(a)(2)(A)(i) of the Act. Nevertheless, we find that the Immigration Judge erred in finding that the respondent's conviction is an aggravated felony as defined in section 101(a)(43) of the Act. The Immigration Judge's finding that deportability under section 241(a)(2)(A)(iii) of the Act will be vacated. Moreover, as a result of the respondent not being convicted of an aggravated felony, he is not statutorily barred from applying for asylum and withholding of deportation. The record, therefore, will be remanded to provide the respondent an opportunity to present his application for asylum and withholding of deportation.[3]

Accordingly, the following orders will be entered.

ORDER: The Immigration Judge's finding of deportability pursuant to section 241(a)(2)(A)(i) of the Act is affirmed.

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[3] We note that the respondent also claimed that he was eligible for a waiver of inadmissibility under section 212(c) of the Act, 8 U.S.C. § 1182(c). At this time, the respondent does not have the requisite 7 years' lawful permanent resident status necessary for eligibility for this form of relief.

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FURTHER ORDER: The Immigration Judge's finding of deportability pursuant to section 241(a)(2)(A)(iii) of the Act is vacated.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this decision.

FOR THE BOARD